

2021.02.09

## **7.1 Deputy I. Gardiner of the Solicitor General regarding any potential legal threats to the Overdale Hospital project**

Will the Solicitor General advise whether there is any potential legal threat to the Overdale Hospital Project from the 2 avenues of legal action under the Compulsory Purchase of Land (Procedure) (Jersey) Law 1961 and the Human Rights (Jersey) Law 2000 outlined in Blakeley Law's letter of 31st January 2021?

### **Mr. M. Jowitt., H.M. Solicitor General:**

There is always a risk to public capital projects such as this one from possible legal challenges. Especially where a challenge is intimated in a letter from a lawyer such as this. Legal challenges to such projects are something of an occupational hazard for decision-makers. How real the threat may be in any given case depends entirely on the merits and the detailed nature of whatever challenge is brought. At the moment, there is no new challenge, only an intimation possibly of one on the broadest and vaguest terms such that it is impossible for me, and indeed any lawyer I would think, to give any meaningful assessment of its merits and consequently the risk that it might pose. I can deal in very general terms with the 2 possible avenues that are mentioned in the Advocate's letter. It is right that there is a very arcane procedure, which allows a petition of Her Majesty in Council. In this instance it is suggested to persuade Her Majesty, through the Privy Council, presumably not to grant Royal Assent to any special law for the purposes of compulsory purchase. As I understand it, that is very much an avenue of last resort, which means that all domestic remedies should have been properly exhausted before that could be pursued. I have no experience of it and I do not know any lawyer who has. The other general suggestion is of an action under Article 7 of the Human Rights Law. That enables a challenge to be made to the States Assembly as decision-maker where the decision engages, in this case it would be Article 1, Protocol 1 of the Convention, which is the right to quiet possession or enjoyment of possession. Any compulsory purchase of land would engage that right. The question remains as to precisely what, if any, the detail of such an application might be. It is only broadly hinted at in the letter that I have seen. It contains the usual sorts of bases one might expect to see in this area, which is the decision-makers did not have regard to all relevant factors or they may have had regard to irrelevant factors in coming to their decision. But, as I say, any lawyer would want to see the detail of such a challenge before advising on it. The other point I would make, and really this would be the advice that any lawyer would want to give, which is that an Article 7 human rights challenge would appear possibly to lie against the Assembly, which would mean effectively all Members as decision-makers collectively as the Assembly could conceivably be parties to such a challenge. Any party to litigation is entitled to receive confidential and privileged legal advice. Any lawyer would be sensible to say that giving that advice in a public forum would be wholly unwise and not be recommended. That is a slightly broad overview, but I fear it is the best I can do in the circumstances.

### **7.1.1 Deputy I. Gardiner:**

Thank you to the Solicitor General for his answer. I would like to follow up on one of the points. There was a claim that, when a compulsory purchase order is made, the States Assembly has to draw up a specific law for each property. The process means that Government has to give due consideration to whether buying or not buying property is absolutely necessary. Can the Solicitor General confirm that is the decision, that the proposition allowed compulsory purchase to all properties together or it should be a decision for each property?

**The Solicitor General:**

I do not think the law descends to that particularity. The special law that the Deputy is talking about would be an enabling legislation, which would have to ultimately receive Royal Assent, enabling the purchase, to my mind at least, of whatever properties were included in that law. So I do not think it is a case of one law per property, but a case of one law for all. That is not to say that the decision in respect of each individual property should not be made in a process that is rational and arrives at a decision that is lawful and rational and procedurally proper. That is a slightly different consideration.

**7.1.2 Deputy M.R. Higgins:**

Just a question for the S.G. Can he point out a distinction between a decision of the States and an Advocate objecting to the decision of the States, which I do not believe they can, if the S.G. can confirm whether that is the case, and a decision taken by a Minister?

**The Solicitor General:**

I am sorry, I missed the middle of the first question because the sound cut out. I wonder if I could ask the Deputy to repeat it?

**Deputy M.R. Higgins:**

Yes. I believe the Advocate concerned was complaining about a decision taken by the States. If it is a decision taken by the States, does any Advocate have a legal means of challenging a States decision? I know that they can challenge the decision of Ministers, but can they challenge a decision of the States?

**The Solicitor General:**

That is a very good question. Can I repeat the advice I gave a moment earlier, which is that any party to litigation would probably be well-advised to seek legal advice, which was given confidentially and under the protection of legal privilege? I am not trying to evade the question. I am simply trying, I hope, to give advice that is wise in all the circumstances.

**7.1.3 Senator L.J. Farnham:**

My understanding is the letter indicates that there could be a challenge under the Human Rights Convention Article 1, Protocol 1. Notwithstanding the S.G.'s comments in relation to the right to enjoyment of land or property, can he shed some light on what would be an appropriate acquisition of land or property by the public without being in breach of Article 1, Protocol 1? For example, is there a public interest test or something that would come into play?

**The Solicitor General:**

Yes. The Article 1, Protocol 1 right is not absolute. It provides that every natural legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

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I do not think we are in international law necessarily here. But it goes on to say: "The preceding provisions shall not however in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with general interest." So there are avenues there under which a lawyer could argue that any particular proposal for the use of property fell within a lawful derogation from Article 1, Protocol 1, the right that is there enshrined.

#### **7.1.4 Deputy I. Gardiner:**

Can the Solicitor General clarify what potential delay, if he knows, the Westmount residents' legal challenge might bring to the project, if they decide to pursue this avenue?

#### **The Solicitor General:**

I fear only in the broadest terms. Assuming any challenge were brought, then whatever the outcome at first instance; that is to say in the Royal Court, there may be an appeal thereafter. It is not obvious necessarily how far an appeal process might go. It is not necessarily obvious in any case, never mind this case, how long a timetable would be to reach an end of legal proceedings. All I can say, I suspect, and probably it is not a matter for me, but where a legal challenge engages a point of general public importance, then one would think that the Judicial Greffier would be keen to ensure that the legal process was expedited so that there was not undue delay in giving effect to any public policy decision. I hope that is helpful.